SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1961

No. 787

DALE BRYSON, *Petitioner*,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

EDWARD BENNETT WILLIAMS
HAROLD UNGAR
1000 Hill Building
Washington, D. C.
Counsel for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Dale Bryson prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, affirming his convictions for conspiracy to sell narcotics and sale of narcotics.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, is printed in the appendix to this petition. App. 1a-5a.

JURISDICTION

The judgment of the Court of Appeals was entered on December 27, 1961. App. 5a. Rehearing was denied on January 10, 1962. App. 6a. The time for filing of this petition was extended until March 9, 1962, by order of Mr. Justice Brennan, entered on February 2, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the trial court was based upon 18 U.S.C. § 3231. The judgment of that court is printed in the appendix hereto. App. 6a.

QUESTIONS PRESENTED

1. Whether Rule 52(b), F.R.Crim.P., may be given so restricted a construction as to permit an appellate court to notice errors in instructions, not brought to the attention of the trial court, only if necessary "to prevent a manifest injustice."

2. Whether, under any construction of Rule 52(b), F.R.Crim.P., an appellate court may properly refuse to consider the failure of the trial court to instruct the jury on the necessity and meaning of criminal intent, in a prosecution for violation and conspiracy to violate narcotics laws, especially when the defendant has testified that his purpose in participating in the activities charged was to act as an informer for a local police officer and the officer in question has testified that the defendant did in fact inform him of the activities charged.

3. What the proper procedure is for prosecuting a single conspiracy to violate two statutes when the penalty varies with the offense found to have been the objective of the conspiracy:

a) Whether such a conspiracy may be charged in two separate counts, as if there were a sepa-

rate conspiracy to commit each substantive offense.

b) If so, whether the jury may be permitted to consider the case on the various conspiracy counts without being instructed not to convict different groups of defendants of separate conspiracies.

STATUTES AND RULE INVOLVED

Section 4704(a) of the Internal Revenue Code of 1954, 26 U.S.C. § 4704(a), 68A Stat. 550, provides:

> "*General requirement.*—It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found."

Section 4705(a) of the Internal Revenue Code of 1954, 26 U.S.C. § 4705(a), 68A Stat. 551, provides:

> "*General requirement.*—It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate."

Section 7237 of the Internal Revenue Code of 1954, 26 U.S.C. § 7237, 68A Stat. 860, as amended, 69 Stat. 3, as amended, 70 Stat. 568, provides:

> "(a) *Where no specific penalty is otherwise provided.*—Whoever commits an offense, or conspires

to commit an offense, described in part I or part II of subchapter A of chapter 39 for which no specific penalty is otherwise provided, shall be imprisoned not less than 2 or more than 10 years and, in addition, may be fined not more than $20,000. For a second offense, the offender shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more than $20,000. For a third or subsequent offense, the offender shall be imprisoned not less than 10 or more than 40 years and, in addition, may be fined not more than $20,000.

"(b) *Sale or other transfer without written order.*—Whoever commits an offense, or conspires to commit an offense, described in section 4705(a) or section 4742(a) shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more than $20,000. For a second or subsequent offense, the offender shall be imprisoned not less than 10 or more than 40 years and, in addition, may be fined not more than $20,000. If the offender attained the age of 18 before the offense and——

"(1) the offense consisted of the sale, barter, exchange, giving away, or transfer of any narcotic drug or marihuana to a person who had not attained the age of 18 at the time of such offense, or

"(2) the offense consisted of a conspiracy to commit an offense described in paragraph (1),

the offender shall be imprisoned not less than 10 or more than 40 years and, in addition, may be fined not more than $20,000."

Rule 52(b), F.R.Crim.P., provides:

"(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

STATEMENT

Petitioner, operator of a bail bond office in Tulsa, Oklahoma, was indicted, with four others, on two counts of conspiracy to violate the narcotics laws. The first count charged a conspiracy to violate 26 U.S.C. § 4705(a) by selling narcotics without a written order on a treasury form. The second count, incorporating by reference the overt acts alleged in the first count, charged a conspiracy to violate 26 U.S.C. § 4704(a) by purchasing narcotics not in or from the original stamped package. The indictment also contained five substantive counts, petitioner being named a defendant in two of the five. R. 3-10.[1]

The prosecution proved, as the court below summarized it, that Charles D. Casey, an undercover agent of the Federal Narcotics Bureau, introduced himself to petitioner as Frank Whalen; that, through petitioner and petitioner's office, Casey met the other defendants; that Casey succeeded in making several purchases of narcotics from defendants other than petitioner; and that petitioner, through his contacts with the other defendants, helped to effect the transactions. App. 3a-4a.

The essence of petitioner's defense was that he cooperated with Casey in order to discover what he was up to, so that he could convey the information to a local deputy sheriff, an officer to whom he had sup-

[1] The record filed herein consists of a copy of (1) the bound, 232-page transcript of record from the United States District Court for the Northern District of Oklahoma, and (2) the separately paginated, typewritten record of proceedings in the Court of Appeals for the Tenth Circuit, all properly certified by the Clerk of the latter court on January 26, 1962. The record references in this petition are to the pages in the bound transcript.

plied information several times in the past. Petitioner's testimony that his purpose was only to learn and report and that he did in fact report what he had learned to the deputy sheriff (R. 180-82, 191) was corroborated by the latter officer. R. 163-68.

The trial court instructed the jury that there were two elements of the offense charged in the conspiracy counts: "first, the act, or acts, of the defendants in wilfully conspiring together to commit an offense or offenses against the United States, as heretofore detailed; and, 2, the commission or performance of one or more of the overt acts charged in the indictment." R. 211-A. The "heretofore detailed" instructions were as follows (R. 210-11):

> (a) That Count I charged that the defendants "unlawfully, wilfully and knowingly conspired . . . to commit offenses . . . by wilfully selling" narcotics.
>
> (b) That Count II charged the defendants with "an unlawful conspiracy . . . to commit offenses . . . by unlawfully purchasing" narcotics.
>
> (c) That the five substantive counts (setting forth the offenses allegedly the objectives of the conspiracy) charged that the respective defendants named therein "unlawfully sold" or "unlawfully purchased" narcotics, as the case might be.

No instruction was given on the necessity for or the meaning of criminal intent. Indeed, the jury was instructed that it could infer conspiracy from acts of the defendants "done in pursuance of an apparent criminal purpose." R. 211-A. The instruc-

tions on the substantive counts likewise omitted any reference to criminal intent.

The trial court also instructed the jury that the indictment actually charged "only one conspiracy to commit offenses against the United States," the purpose of separating the charge into two counts being merely to aid in determining a proper sentence, since the penalties were different for sale offenses and purchase offenses. R. 211-211A.

It does not appear from the record that petitioner objected to the instructions as given or requested any other instructions. All that appears is that when the trial court asked whether counsel were "satisfied with the instructions," the prosecutor replied: "We are satisfied, Your Honor." R. 217.

The jury returned a verdict of guilty against petitioner on the first conspiracy count and one of the substantive counts. It acquitted him of the other conspiracy count and the other substantive count. R. 11, 225. Petitioner was then sentenced to two concurrent five-year terms of imprisonment. App. 7a. Three of the other defendants were found guilty on both conspiracy counts, and the fourth, like petitioner, was convicted on the first conspiracy count and acquitted on the second. All of the defendants other than petitioner were found guilty of all of the substantive violations charged against them. R. 224-26.

On appeal to the Tenth Circuit, petitioner attacked his conspiracy conviction upon the ground that he could not validly be charged with two conspiracies when there was only one. As to both counts of which he was convicted, petitioner sought reversal for failure of the trial court to give adequate instructions to

the jury. The court below summarily rejected petitioner's first contention without explanation. App. 5a. As to the second contention, the court below, though concluding that petitioner's "participation in the conspiracy was but upon the fringe and foolish" (App. 4a), rejected the attack upon the insufficiency of the instructions, because "the record shows no objection to nor request for instructions in such regard" and "[e]xcept to prevent a manifest injustice (and none appears here) we will not consider" the claim of error. App. 4a-5a. Accordingly, on December 27, 1961, the court below affirmed petitioner's conviction. App. 5a. A petition for rehearing attacking a portion of the instructions not here relevant was denied by the court below on January 10, 1962. App. 5a.

REASONS FOR GRANTING THE WRIT

1. The decision below presents a very basic question as to the meaning of the plain error rule incorporated in Rule 52(b), F.R.Crim.P.: whether, in order for error to be noticed under Rule 52(b), it must be error but for which there would necessarily have been an acquittal; or whether substantial possibility that the error affected the result is sufficient basis for an appellate court to notice it. The question, obviously of great importance in the administration of criminal justice, has never been passed on by this Court.

In holding that no "manifest injustice" resulted from the erroneous instructions to the jury, the court below interpreted Rule 52(b) to mean that, even if petitioner *might* have been acquitted under proper instructions, the error was not to be noticed unless he *would* have been acquitted. An analysis of the instructions shows that the jury was told absolutely nothing

about criminal intent as an element of the offenses charged. Indeed, the jury was instructed that it could hold petitioner criminally responsible for acts done in pursuance of an *apparent* criminal purpose. It could, therefore, have assumed that petitioner was guilty, even if his *real* purpose was, as he testified, to aid in law enforcement. That possibility was heightened, moreover, by the fact that the agent of the Federal Narcotics Bureau who built the case was himself named in the indictment, but only as a co-conspirator and not as a defendant. R. 3, 8. The jury could have assumed from this circumstance that a participant in a narcotics transaction *ipso facto* commits an offense, regardless of his purpose, and may be convicted if the government sees fit to make him a defendant. It follows, therefore, that petitioner may have been convicted although the jury believed him free of criminal intent.

There is, of course, a possibility that, even if properly instructed, the jury could have convicted petitioner because it disbelieved both his testimony and the corroborating testimony of the deputy sheriff. It cannot be assumed that the court below was holding that one who cooperates with criminals in order to de-

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[1] The view formerly prevailing that the statutory narcotics offenses required no criminal intent has been modified by this Court's restriction of *United States* v. *Behrman*, 258 U. S. 280, to its own specific facts. See *Linder* v. *United States*, 268 U. S. 5, 22; *Morissette* v. *United States*, 342 U. S. 246, 260. The *mens rea* requirement applies *a fortiori* to the conspiracy count. *Cruz* v. *United States*, 106 F. 2d 828, 830 (10th Cir. 1939); *Hamburg-American Steam Packet Co.* v. *United States*, 250 Fed. 747, 759 (2d Cir. 1918), *cert. den.*, 246 U. S. 662.

tect and apprehend them is himself guilty of the crime. The holding below must have been, therefore, that Rule 52(b) was inapplicable because the jury *could* have convicted petitioner even if properly instructed.

2. The Tenth Circuit's construction of Rule 52(b) as requiring certainty, rather than possibility, that the error produced the wrong result is in conflict with the interpretation of the Rule in other circuits. The Court of Appeals for the District of Columbia Circuit, for example, in *Mullen* v. *United States*, 263 F. 2d 275, 276 (1959), after concluding that an instruction omitting the requirement of an evil state of mind was erroneous, reversed the conviction pursuant to Rule 52(b) because the "jury *might* well have acquitted appellant but for the erroneous charge."[4] The Court of Appeals for the Third Circuit used Rule 52(b) to reverse a conviction in *United States* v. *Cumberland*, 200 F. 2d 609, 611 (1952), because "[t]he *likelihood* of injustice *seems sufficient* to require a new trial." The Court of Appeals for the Seventh Circuit, in *United States* v. *Raub*, 177 F. 2d 312, 315 (1949), although finding there was ample evidence to sustain the conviction, reversed the judgment under Rule 52(b) because of omission of an intent element from the instructions, pointing out that, under Rule 52(b),

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[3] It seems unthinkable that the government would urge, or the Court adopt a construction of the narcotics statutes which would subject to prosecution and conviction at the prosecutor's whim not only the "special employees" customarily used to ferret out violations, but also the regular officers of the Narcotics Bureau. See *State* v. *Torphy*, 78 Mo. App. 206 (1899), and authorities there cited; cf. 7 Wigmore, *Evidence*, 3rd edition, § 2060, subdivision (d), and cases cited at note 16.

[4] Emphasis here and hereinafter supplied.

the error need only be "*capable of* resulting in miscarriage of justice. . . ."

3. The Tenth Circuit's interpretation of Rule 52 (b) is also in conflict with the often-expressed philosophy of this Court that errors affecting fundamental rights of an accused may be noticed on appeal though not brought to the attention of the trial court. See, for example, *Screws* v. *United States*, 325 U.S. 91, 107; *United States* v. *Atkinson*, 297 U.S. 157, 160; *Brasfield* v. *United States*, 272 U.S. 448; *Wiborg* v. *United States*, 163 U.S. 632, 658. This Court has not yet specifically construed Rule 52 (b).[1] It has, however, said in a civil case that an appellate court may consider points not brought to the trial court's attention, "where injustice *might* otherwise result. . . ." *Hormel* v. *Helvering*, 312 U.S. 552, 557. Referring to the latter decision, it was said in *United States* v. *O'Connor*, 237 F. 2d 466, 472, n. 4 (2d Cir. 1956):

> "For obvious reasons the Federal Rules of Criminal Procedure should be given, if anything, a more liberal interpretation in this regard."

This Court has had one occasion in the past to correct the Tenth Circuit's interpretation of Rule 52 (b).[2]

[1] Omission from instructions of an essential element of the crime charged is, of course, a deprivation of fundamental rights. *Christoffel* v. *United States*, 338 U.S. 84, 90. Mere reference in the instructions to the willfulness element of the indictment is insufficient without an instruction of "evil intent." *Schaefer* v. *United States*, 251 U.S. 466, 482 (1920).

[2] The Court cited Rule 52 (b) in *United Brotherhood of Carpenters and Joiners* v. *United States*, 330 U.S. 395, 412, n. 25 in connection with its statement that it can notice an incorrect instruction as "plain error" though it is not assigned or specified.

but the disposition of that matter seems to have left the problem still in need of clarification. In *Ryles* v. *United States*, 172 F. 2d 72, 74 (10th Cir. 1949), the court below, while recognizing that the evidence justified submission of an entrapment issue to the jury, but finding that no instruction on the issue had been requested, refused to apply Rule 52(b) because it could not say that there had been "a miscarriage of justice". There followed a petition to this Court for a writ of certiorari, arguing principally the contention that the Tenth Circuit was wrong in imposing "miscarriage of justice" as a Rule 52(b) standard. The memorandum of the Solicitor General, though not specifically confessing error, did not contest the contention that the court below had misapplied Rule 52(b). The Solicitor General suggested that "the interests of justice would be served by permitting the case to be retried . . . to explore the issue of entrapment fully and have all the relevant evidence presented." *Ryles* v. *United States*, October Term 1948, No. 593, Memorandum of Solicitor General, p. 13. This Court, by *per curiam* order, granted the petition for certiorari and, following the Solicitor General's suggestion, vacated the judgment and remanded the case for a new trial. *Ryles* v. *United States*, 336 U.S. 949.

It is submitted that this Court could not have reached the result it did in *Ryles* without overruling the Tenth Circuit's concept of "miscarriage of justice" as a standard for applicability of the plain error rule. Yet, the Tenth Circuit continues to cite its *Ryles* opinion as a proper statement of the rule, calling this Court's action a reversal "on other grounds." See *Fischer* v. *United States*, 212 F. 2d 441, 444 (10th Cir. 1954). It would seem, therefore, that, proper ap-

plication of Rule 52(b) will not be assured unless and until this Court once again grants certiorari on the issue.

4. This petition also brings before the Court the question of the procedure to be employed in prosecution for a single conspiracy to commit multiple offenses when the penalty varies with the offense found to have been the object of the conspiracy. This problem became significant with the 1948 amendment of the general conspiracy statute to provide a lesser penalty when the object of the conspiracy was a misdemeanor rather than a felony. Act of June 25, 1948, c. 645, 62 Stat. 701, 18 U.S.C. § 371, see *Williams* v. *United States*, 238 F. 2d 215, 217 (5th Cir. 1956). The problem takes on importance, moreover, from the increasing number of criminal statutes which incorporate their own conspiracy provisions rather than relying on the general conspiracy provision in 18 U.S.C. § 371. See, for example, 18 U.S.C. §§ 241, 286, 372, 757, 793, 794, 956, 1201, 1951, 2153-56, 2271, 2284-85 and 2388. The magnitude of the problem was enhanced in regard to narcotics cases, such as the instant one, when, in 1956, Congress greatly increased the penalties for conspiracies in such cases. Act of July 18, 1956, c. 629, Title I, § 105, 70 Stat. 568, 26 U.S.C. § 7237.[1] It has become a common practice, in narcotics cases, to charge the same conduct as violating several different statutes. The

[1] To the extent that the problem bears specially on narcotics cases, its importance is enhanced by the great number of such prosecutions. It was pointed out in *United States* v. *Heyward*, 290 F. 2d 86, 97 (2d Cir. 1961), that narcotics cases constituted over 17% of the total number of criminal cases pending in the Southern District of New York both at the beginning and the end of the reporting year June 1, 1959 to May 31, 1960.

punishment imposable for a conspiracy to violate a narcotics statute has a very wide range depending on the statute violated. Thus, under the statutes claimed to have been violated in *Brown* v. *United States*, D.C. Cir., No. 16,135, decided January 12, 1962, the minimum sentence could have ranged from zero to five years and the maximum from five years to twenty years. Upon conviction of conspiracy to violate certain of the narcotics statutes, moreover, the defendant becomes ineligible for either suspension of sentence or parole. 26 U.S.C. § 7237(d). Where, therefore, it is clear that there has been only one conspiracy but that the objective was to violate more than one statute, the mode of prosecution is of vital significance.

This Court has never ruled on the question and the lower courts appear to be divided in their approach. Referring to a charge of conspiracy to commit both felonies and misdemeanors, the Court of Appeals for the Fifth Circuit has suggested that "it would appear to be the better practice to list all the felonies and all the mere misdemeanor objects . . . in separate counts. . . ." *Williams* v. *United States*, *supra*, 238 F. 2d at 218 n. 2. Another possible procedure is to charge in one count but instruct the jury to render a special verdict to specify the proven object or objects of the conspiracy. *Brown* v. *United States*, *supra*. In the Southern District of New York, one judge has held that a one-count charge of conspiracy in a case like the instant one would have been duplicitous. *United States* v. *Shackelford*, 180 F.Supp. 857 (S.D.N.Y. 1957). The government continues, however, in the Southern District, to maintain that it should charge in one count where the objects of the conspiracy may carry different penalties, relying upon the special verdict technique to provide

specificity. Thus, in successfully resisting defense motions for dismissal in a *Williams*-type situation, the government argued:

> "The only consequence of the distinction between a conspiracy to commit a felony and a conspiracy to commit a misdemeanor is in the possible sentence to be imposed. A defendant's right to be subject to a lesser maximum sentence if the jury convicts him only of a conspiracy to commit a misdemeanor can be safeguarded by requiring the jury to give a special verdict." *United States* v. *Braun*, S.D.N.Y., No. 61 Crim. 694, Government's Memorandum of Law filed November 9, 1961, p. 59.

In the instant case, the government, choosing to proceed as suggested by *Williams*, indicted in separate conspiracy counts although it claimed only one conspiracy. The jury was instructed that, despite the separation of counts, only one conspiracy was involved. Petitioner's attack upon the indictment for alleging one conspiracy in two separate counts was brushed aside in both courts below without discussion. Both courts below failed to consider the question here presented—whether, when there is one conspiracy, the case may be presented to the jury on an indictment and instructions which permit the jury to find that two of the five defendants were not guilty of it (as the jury here did in its Count II verdict) and, at the same time, that all five defendants were guilty of it (as the jury did in its Count I verdict).

Count I of this indictment charges a conspiracy to violate 26 U.S.C. § 4705(a) by sale of narcotics without the prescribed written order. Count II, on the same overt acts, charges a conspiracy to violate 26

U.S.C. § 4704(a) by purchase of narcotics not in or from the original stamped package. While it is settled that the two statutes define separate crimes even though there be but one transaction, *Blockburger* v. *United States*, 284 U.S. 299, a conspiracy to do the one act is but one crime, though with multiple objectives.[5] And so the government here realized when it took the position that there was only one conspiracy involved; and so the trial court instructed the jury. Since a conspiracy to violate § 4705(a) carries a sentence of five to twenty years, while a conspiracy to violate § 4704(a) carries a sentence of only two to ten years, it is important to know what a jury means by a verdict of guilty when the charge is conspiracy to violate both statutes. It was for that reason, the trial court told the jury, that the conspiracy charge in this indictment was stated in two separate counts. Had the jury, as to all defendants found guilty of conspiracy, found them guilty under the same count or counts, there would be no problem. But, as the case was presented to the jury, they seem to have been invited to split counts, with the result that petitioner and another were acquitted in Count II of a conspiracy of which they were convicted in

[5] This is all the more true in the instant case in view of the fact that 26 U.S.C. § 4704(a) forbids not only purchases, but also sales. Neither § 4704(a) nor § 4705(a), as this Court said in *Blockburger*, 284 U.S. at 304, is aimed at the transaction *qua* transaction, but rather at the violation of the statutory requirements—tax stamps and treasury order forms. A transaction violating § 4704(a) is a crime whether it be a sale or a purchase. By indicting in Count I for conspiracy to *sell* in violation of § 4705(a) and in Count II for conspiracy to *purchase* in violation of § 4704(a), the government created the illusion of two conspiracies, even though claiming only one, and thereby invited the jury to decide as it did.

Count I. This is so because, since there was only one conspiracy, it must have had the two objectives of which the other three defendants were convicted. There is no other possibility, unless there were two separate conspiracies—one with all five defendants participating and the other with only three defendants involved.

We submit that it would have been better practice to indict in one count for the one conspiracy to violate two statutes and then order the jury to render a special verdict as to whether the conspiracy had both objectives, or if only one, which one. The jury would also be instructed that, whatever objective it found the conspiracy to have, it could convict only such defendants as it found to have conspired to accomplish that objective. It would have been impossible, under such procedure, to find some defendants guilty of a conspiracy to accomplish one objective and others of a conspiracy to accomplish another objective when the government claimed and the evidence sustained only one conspiracy.

If, on any theory, it should be held proper to indict in separate counts, the validity of such an indictment should depend upon the giving of instructions calculated to prevent the jury from finding two conspiracies where only one is charged. When, in the instant case, petitioner questioned the validity of the indictment (R. 150, 210), the trial court, if it would not dismiss the conspiracy counts or, at least, compel the government to elect between them, was required to instruct the jury that it could not find different defendants guilty of different parts of the single conspiracy. The instructions given, however, not only were devoid of any such statement, but were later supplemented by answers to jurors' questions which could only have

further obfuscated matters. See the following colloquy:

"Another Juror: Your Honor, may I ask one direct? Does that count that—or, on counts 1 and 2, could those people involved be found independantly guilty or innocent, or are we speaking of a group there?

"The Court: No defendant may be found guilty——

"The Juror: I am speaking of two or more—could any two of the five be found guilty of the conspiracy without finding the other three?

"The Court: Oh, yes.

"The Juror: Thank you.

"The Court: Yes, you may find as many as two guilty and others not guilty under Counts 1 and 2. There must be at least two involved in order to have an unlawful agreement; you can't have less than two involved in an unlawful agreement or conspiracy. But you might find two guilty, and the other three not guilty, or three guilty and two not guilty,—as the case may be.

"The Foreman: Your Honor, for one more clarification—this is a hypothetical question, but if for example two could be found guilty upon one, under one set of circumstances of what we consider a conspiracy, and two different ones found guilty, but the circumstances involved though were entirely separated, would that still constitute guilt?

"The Court: What you have in mind would be a possibility of finding two separate and distinct, unrelated conspiracies?

"The Foreman: What we might consider unrelated, right.

"The Court: No—no, the charge is that there was but one conspiracy entered into by the parties,

> and under the instructions given you by the Court you would not be permitted to find the parties guilty of completely unrelated—more than one completely unrelated conspiracy." R. 220-221.

The trial court thus appeared to be telling the jury that, while it could not find any of the defendants guilty of a "completely unrelated conspiracy", it could properly break the one conspiracy into related subsidiary conspiracies and find different defendants guilty of different subsidiary conspiracies.

If, as we submit, it was improper to submit the case to the jury on this indictment and these instructions, it is anticipated that the government will say in opposition that the error was harmless since petitioner's five-year sentence is supported by the conviction of the substantive offense in Count VII. However, if the Court should reverse the judgment below on the other issue here presented—namely the misapplication of Rule 52(b), F.R.Crim.P., to the lack of any instruction on criminal intent, then the questions will arise whether petitioner may be tried again for the alleged conspiracy (of which the jury acquitted him by its Count II verdict) and, if so, whether he may be tried on the present indictment. The issue here under discussion is, therefore, a proper one for decision by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD BENNETT WILLIAMS
HAROLD UNGAR
Counsel for Petitioner

March, 1962.

APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

November Term, 1961

No. 6749

JAMES McMURRAY, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

No. 6750

DALE BRYSON, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

(Filed United States Court of Appeals, Tenth Circuit
December 27, 1961)

Appeal from the United States District Court for
the Northern District of Oklahoma

John D. Harris (Howard, Carr & Harris were with him on the brief) for Appellant, James McMurray.

John L. Ward, Jr., and Valdhe F. Pitman (Malcolm Baucum was with them on the brief) for Appellant, Dale Bryson.

John M. Imel and Phillips Breckinridge for Appellee.

Before BRATTON, LEWIS and BREITENSTEIN, Circuit Judges.

LEWIS, Circuit Judge.

James McMurray and Dale Bryson and others were jointly charged, tried and convicted of offenses involving the unlawful trafficking in narcotics. The indictment

was in seven counts alleging the defendants' participation in a conspiracy to violate the prohibition contained in 26 U.S.C.A. 4705(a) and 26 U.S.C.A. 4704(a) and the substantive violation of the statutes. McMurray was convicted upon six counts including counts 1 and 7. Count 1 charged a conspiracy to unlawfully sell narcotics in violation of 26 U.S.C.A. 4705(a); count 7 charged the unlawful sale of narcotics in violation of such section. Bryson was convicted only upon counts 1 and 7. The trial court imposed the maximum sentences upon McMurray for each of the counts upon which he was found guilty and so designated the sentences to run concurrently or consecutively as to provide a total imprisonment of forty years. The sentence upon each of counts 1 and 7 was set at twenty years to run consecutively. Bryson was sentenced to five years upon each of counts 1 and 7, the sentences to run concurrently.

Upon separate appeal, each defendant questions the sufficiency of the evidence in varying particulars to form a basis for his convictions and also makes additional claims of error occurring in the course of the trial. No argument is made, however, by the defendant McMurray that the evidence is insufficient to warrant his conviction on count 7 for the uncontradicted evidence clearly shows a specific and unlawful sale of narcotics made personally by McMurray to a government agent. It follows, because McMurray's period of total imprisonment may be composed of the consecutive sentences imposed under counts 1 and 7, that our consideration need only be concerned with his conviction under count 1. And, because concurrent sentences were imposed upon the defendant Bryson under counts 1 and 7, our treatment of his claims may be similarly limited.[1] Lawn v. United States, 355 U.S. 339, 78

[1] We have, however, reviewed the entire record as it affects each defendant's conviction under each count and consider the evidence more than sufficient to support each and all judgments of conviction.

S. Ct. 314, 2 L. Ed. 321; Travis v. United States, 10 Cir., 269 F. 928; Cummings v. United States, 10 Cir., 289 F. 903.

Appellants' counsel do not, nor do we attempt to do more than summarize the evidence as it reflects in a somewhat long and complex record reciting events occurring in Tulsa, Oklahoma, during the course of a six-week investigation conducted by federal narcotic agents with the cooperation of local authorities. The investigation began when agent Casey, indicating an interest in the purchase of narcotics, made a cold contact with Bryson at this defendant's bail bond office in Tulsa. Bryson asked the agent to phone him at the office at a later time. Upon so doing, the agent talked to Don Jones[1] who was in Bryson's office. Bryson was not then present. At later meetings with Jones two purchases of contraband drugs were consummated with McMurray indicated as the source of supply. After informing Bryson of an interest in dealing directly with McMurray, the agent made the direct purchase from McMurray which we have indicated supports McMurray's conviction under count 7. This purchase was consummated only after Bryson informed McMurray that the agent was "solid."

From these highlights, the defendant McMurray asserts that no conspiracy is shown and that the transactions are but sporadic sales; and, alternately, that multiple conspiracies are shown which cannot be the basis for conviction as obtained. We see no merit to either contention. The key to all the transactions lies in the willingness of the agent Casey to purchase narcotics and the willingness of all the defendants to participate in accomplishing that end. A fair interpretation of the evidence shows a flow of narcotics from McMurray to the agent through the efforts

[1] Jones, Dillon and Corby are each co-defendants with appellants. Each was found guilty under one or more of the counts contained in the joint indictment.

and acts of the other defendants; and finally, a direct sale from McMurray to the agent. The claim that those conspirators who purchased from McMurray to sell to the agent were "independent contractors" is unique but without foundation, and indeed unknown to the law. We hold the evidence ample to support the defendant McMurray's conviction under count 1.

Although Bryson's participation in the conspiracy was but upon the fringe and foolish still the evidence is clear as to his involvement. The record shows he was in intimate contact with all the co-defendants and was familiar with the transactions as they occurred. On one occasion he told the agent that a purchase from the defendant Corby which had failed because of a disagreement as to terms could have been safely and satisfactorily made. In another conversation he indicated an interest in direct participation in a sale but stated he could not obtain the quantity of drugs required. Through the whole investigation Bryson served as a clearinghouse for contacts made by the agent with the defendants. The final sale by McMurray to the agent was accomplished only through the direct participation of Bryson. And his every effort furthered the unlawful purpose of the other participants—the unlawful sale, distribution and trafficking in drugs.

Counsel for Bryson point out that the evidence against Bryson is consistent with that defendant's subjective claim that he was cooperating with the agent for the purpose of ultimately disclosing the agent's activities to the police. And near the close of the investigative period, Bryson did tell a police officer that a large, unnamed, out-of-town purchaser of narcotics was in Tulsa. Error is claimed in the trial court's failure to instruct the jury as to this theory of defense. But the record shows no objection to nor re-

[1] This is reflected both in the jury's careful consideration of the counts upon which a verdict of guilty was found and in the court's imposition of sentence.

quest for instructions in such regard and in such case the claim is not preserved for appellate consideration. Except to prevent a manifest injustice (and none appears here) we will not consider a claim of error in the instructions when no request nor objection premises the claim of error. Ditrich v. United States, 10 Cir., 243 F. 729; Kreinbring v. United States, 8 Cir., 216 F. 671; Apel v. United States, 2 Cir., 247 F. 277; Bridgman v. United States, 9 Cir., 183 F. 750.

Appellant Bryson also asserts that the indictment is faulty as to him because it charges in multiple counts and contains no allegation of an overt act of Bryson other than acts done with the agent Casey; citing Sprague v. Ackerholt, D.C. Ga., 45 F. 790 and DeMayo v. United States, 8 Cir., 32 F. 472. We see no application of these cases to the instant one. The overt act necessary to activate a conspiracy may be that of any conspirator. Braverman v. United States, 317 U.S. 49, 63 S. Ct. 99, 87 L. Ed 23.

Finally, appellant McMurray contends that the imposition of multiple sentences totalling forty years was both harsh and illegal. We have earlier rejected a similar contention. Smith v. United States, 10 Cir., 273 F. 462.

The judgments are severally affirmed.

Judgment

Thirtieth Day, November Term, Wednesday, December 27th, 1961.

Before Honorable Sam G. Bratton, Honorable David T. Lewis and Honorable Jean S. Breitenstein, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Oklahoma and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said

district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Dale Bryson, appellant, surrender himself to the custody of the United States Marshal for the Northern District of Oklahoma, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

Order Denying Petition for Rehearing

Third Day, January Term, Wednesday, January 10th, 1962.

Before Honorable Sam G. Bratton, Honorable David T. Lewis and Honorable Jean S. Breitenstein, Circuit Judges.

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 13,632 Criminal

UNITED STATES OF AMERICA, *Plaintiff*,

v.

JAMES McMURRAY, *et al.*, *Defendants*.

Judgment and Commitment of Dale Bryson

On this 17th day of February, 1961 came the attorney for the government and the defendant appeared in person and by counsel, John L. Ward, Jr., and Valdine Pittman.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty, of the offenses of having violated Title 26 U.S.C. 4705(a), 7237(b), in that he unlawfully conspired to sell narcotic drugs without written orders of the person to whom the drugs were to be sold and not on blanks issued for that purpose by the Secretary of the Treasury; and on or about December 8, 1960, did sell to Cliff Roberts 791 dolphine hydrochloride tablets and 25 cocaine hydrochloride tablets, such sale not being made in pursuance of a written order nor on the proper form provided for that purpose, as charged in Counts 1 and 7 of the Indictment; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

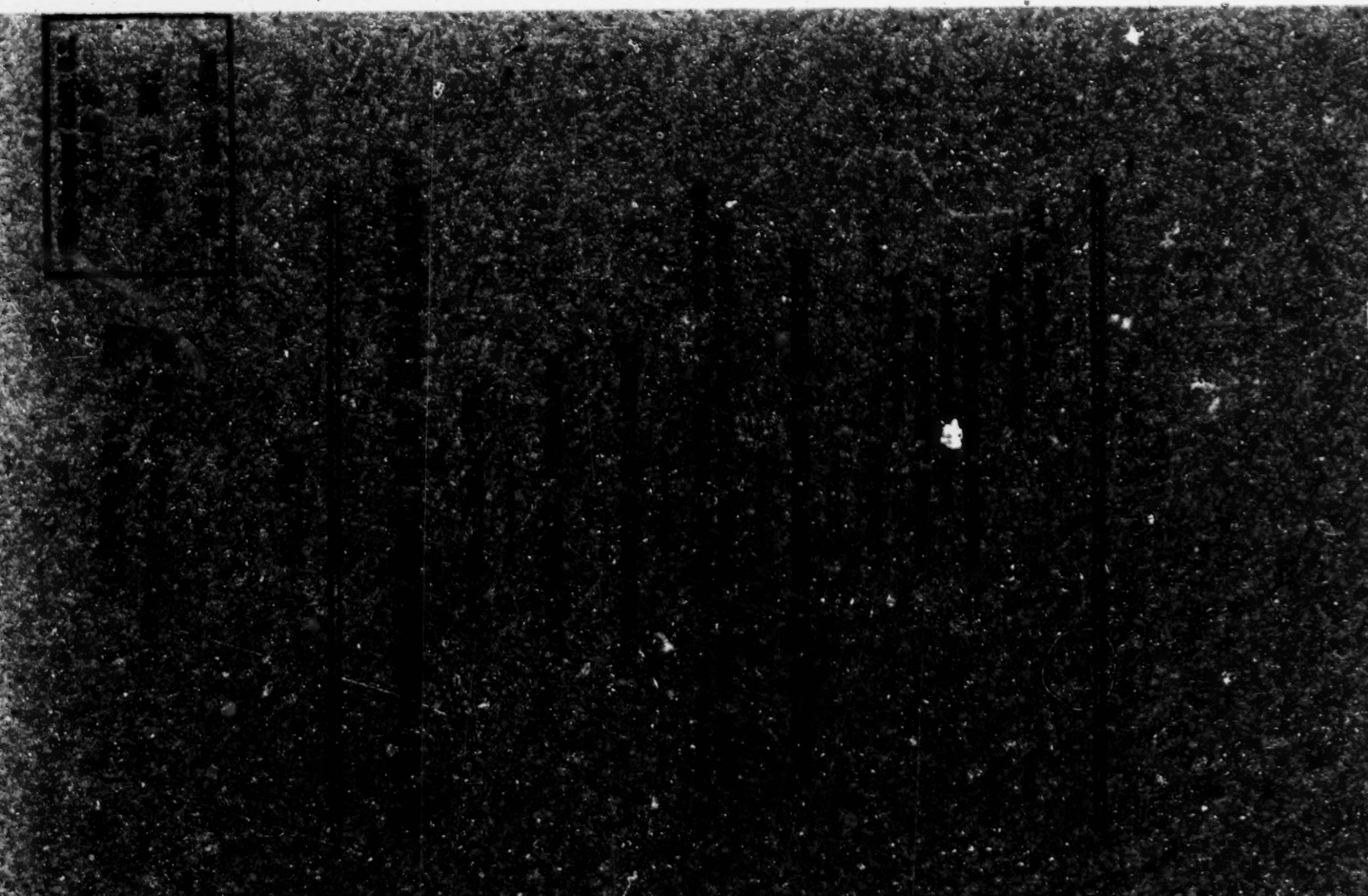
It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Count One—Five (5) Years Count Seven—Five (5) Years. Said sentence shall run concurrently with the sentence in Count One.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Approved as to form:

United States District Judge
ROYCE H. SAVAGE
ROBERT S. RIZLEY
United States Attorney

Filed February 17, 1961.



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635453—62

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 787

DALE BRYSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on December 27, 1961. A petition for rehearing was denied on January 10, 1962. The time for filing a petition for a writ of certiorari was extended by Mr. Justice Brennan to March 9, 1962, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, on a charge of conspiracy to violate the narcotic laws, the judge gave adequate instructions on intent.

2. Whether the fact that the jury acquitted petitioner on one of two counts of conspiracy (which the judge charged were aspects of one agreement) prejudiced petitioner.

STATUTES INVOLVED

The pertinent provisions of the Internal Revenue Code, Title 26, U.S.C. are:

> Section 4704(a)
>
> *General requirement.*—It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.
>
> * * * * *
>
> Section 4705(a)
>
> *General requirement.*—It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.
>
> Section 7237
>
> (a) Where no specific penalty is otherwise provided.—Whoever commits an offense, or conspires to commit an offense, described in

part I or part II of subchapter A of chapter 39 for which no specific penalty is otherwise provided, shall be imprisoned not less than 2 or more than 10 years and, in addition, may be fined not more than $20,000. * * *

(d) Sale or other transfer without written order.—Whoever commits an offense, or conspires to commit an offense, described in section 4705(a) or section 4742(a) shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more than $20,000. * * *

STATEMENT

An indictment in seven counts was returned against petitioner and others in the United States District Court for the Northern District of Oklahoma (R. 3–16). The first count charged that all defendants engaged in a conspiracy from November 1 to December 8, 1960, to sell narcotic drugs without the written order form required by 26 U.S.C. 4705(a) (R. 3–8). The second count charged a conspiracy among the same defendants to purchase narcotics not in or from the original stamped package, in violation of 26 U.S.C. 4704(a). The other counts charged substantive offenses. Petitioner was named a defendant in counts six and seven, charging sales without order form on December 1, 1960, and December 8, 1960 (R. 9–10). On trial by jury he was convicted on count 1 (charging conspiracy to sell without order form) and count 7 (charging a sale on December 8, 1960) and was given concurrent sentences of imprisonment for five years (R. 11, 14). The court of appeals affirmed the conviction.

The pertinent facts may be summarized as follows:

1. A narcotics agent, using the name of Frank Whalen, went to petitioner's bail bond office in Tulsa on November 1, 1960, and asked if he could get in touch with Clyde Jenkins (R. 29). Petitioner said he would take a message for Jenkins who was out of town (R. 29). Thereafter, in a conversation with petitioner outside the office, the agent said "You know, I have been dealing with Jenkins; you know I bought from him. I want to buy some more. What I need is a connection." Petitioner gave the agent his card and suggested that he call the next day (R. 29–30). The next evening the agent telephoned petitioner's office and spoke with petitioner who asked him to call back in a little while. When the agent did so, petitioner was out but one Don Jones introduced himself as a close friend of Jenkins (R. 31–32). Jones came to see the agent and subsequently sold narcotics to the agent (R. 34–35).

On November 28, 1960, the agent returned to Tulsa and telephoned petitioner who reported that Jones and Jenkins were looking for the agent (R. 37–38). When the agent later asked what petitioner meant by that, petitioner explained that Jones had narcotics for the agent.[1] A sale was consummated on December 1 (R. 40–46). During the course of this transaction delivery was once attempted by "Annette" [Annette Corby] because Jones was in jail. The

[1] According to Whelan and agent Roberts who witnessed the conversation, petitioner said, "Jones has some half grain dilaudid for you, some morphine, and we feel you can make some money off of it" (R. 38–39, 85–86).

agent refused to give her money until he had the narcotics (R. 41). Petitioner, in a telephone conversation with the agent, said that he was getting Jones out of jail but that the agent could have dealt with Annette (R. 44):

> * * * you could have done business with her; she had the stuff. But she just couldn't give it upwithout the money.

The agent at one point told petitioner he would rather deal with "Icicle" (defendant McMurray), Jones' source of supply, "as Jones talks too much" (R. 39). On December 6 the agent, in a telephone conversation, told petitioner he was going to call "Icicle" and refer him to petitioner (R. 49–50). On December 8, McMurray came to see the agent and in conversation reported that petitioner had said the agent was "all right" (R. 51–54). McMurray stated the conditions under which he would deal. Agent Whalen refused to deal that way, but another agent, who was with Whalen posing as a friend, said that he would (R. 54, 90–91). The second agent bought from McMurray 596 tablets of dolophine and a bottle of cocaine, a sale which formed the basis of count 7 (R. 91–95).

Petitioner was arrested by state officers on December 8 for conspiracy to violate the narcotics laws (R. 127–128). When asked if he knew any sources of supply, petitioner first denied any knowledge and then said that a Yankee in a Cadillac was in the narcotics business and that petitioner had given him telephone numbers and vouched for him as a "solid man" to McMurray (R. 129, 143).

2. For petitioner, a deputy sheriff of Tulsa County testified that about December 1, 1960, petitioner told him, "What would you think if I told you that Dillon and Jones and Jenkins was handling dope?" Petitioner, according to the deputy's testimony, said he had received this information by associating with a Yankee named Frank Whalen with lots of money who was buying dope (R. 164). The deputy sheriff did not report this information to anyone (R. 168).

Petitioner, on his own behalf, testified that "Whalen" came to his office looking for Jenkins. Later, when they were downstairs the agent asked for the address of Don Jones which petitioner said he could get upstairs, but the agent said he would call the next day. This was the reason petitioner gave the agent his card. No narcotics were discussed at that time (R. 175–177). Late in November the agent told petitioner he wanted to see Jones from whom he had received "some stuff" (R. 179). When petitioner asked if the agent could use some typewriters, adding machines, and things like that in his business, the agent said "he was more interested in dilaudid." Petitioner asked what dilaudid was, but could not remember the reply (R. 179–180). Petitioner said that he originally thought the agent was a big "fence" and sought information for the deputy sheriff who was particularly interested in burglaries (R. 180–181). Petitioner testified that he did not know McMurray ("Icicle"), when the agent said he was going to refer McMurray to petitioner (R. 183), and that, when McMurray did call him early in the morning asking about Whalen, petitioner said "it seemed

like he was all right" (R. 197). He denied knowing that McMurray was in the narcotics business (R. 197) and denied knowing about the others except as he had learned about their involvement in narcotics from Whalen (R. 181). He did not remember having a conversation with the agent about Annette having the "stuff" with her when she met the agent (R. 195–196).

3. The judge's instructions at the close of the case (R. 210–218) summarized the charges of each of the seven counts of the indictment (R. 210–211) but placed most emphasis on the conspiracy count (R. 211A–214). The judge charged in part (R. 211A):

> Where two or more act together to accomplish something unlawful, a conspiracy is shown, even though there be no direct evidence of an express agreement. An agreement is generally a matter of inference deduced from the acts of the persons accused, done in pursuance of an apparent criminal purpose. It is not necessary that all of the conspirators be acquainted one with another; it may be that they have not been previously associated together. One conspirator may only know a few of the others. But where one who knows that others are acting together to violate the law intentionally cooperates to further the object of the scheme he becomes a party to it.

The judge also charged that an aider and abettor is guilty as a principal and further that one who "wilfully causes an act to be done, which if directly performed by him or another would be an offense against the United States is likewise punishable as a principal." He charged that it is "a violation of the

laws of the United States" for a person to sell narcotics without the prescribed order form or to purchase, sell or distribute except in the original stamped package (R. 212).

The judge explained to the jury that while there were two counts of conspiracy, one charging unlawful sale and the other unlawful purchase, there was only one conspiracy involved, the two counts being separated because the maximum penalty for each statute violated was different (R. 211).[2] In the course of their deliberations, the jury came back with questions, including whether "a person aiding or abetting in the sale of goods, would that automatically be considered that he aided in the purchase of the goods?" The judge said that this would not be automatic (R. 221–222). Thereafter, the jury returned its verdict, finding all defendants on trial guilty of both conspiracy counts, except petitioner and Annette Corby,

[2] The court's instructions on this point were (R. 211–211A):

"While the conspiracy phase of the indictment is separated into two counts, it actually charges only one conspiracy to commit offenses against the United States. Count 1 charging that it was part of the conspiracy that the defendants did wilfully and unlawfully sell narcotic drugs, and Count 2 charging that it was a part of the conspiracy that the defendants would wilifully and unlawfully purchase narcotic drugs. And as I explained to you on your voir dire examination, the only purpose—the only reason for dividing the conspiracy charge into two separate and distinct counts is because under the law the maximum penalty which may be imposed for an offense involving the sale of narcotics is different from maximum penalty that may be imposed under the law for the offense involving the purchase of narcotics. It is only by division into two counts that the verdict returned by the jury could properly be interpreted, if it should become necessary—to determine what an appropriate sentence would be."

who, on the conspiracy counts, were found guilty on count 1 charging conspiracy to sell, but not guilty on count 2 charging conspiracy to purchase.

ARGUMENT

1. Petitioner's entire argument as to the proper scope of "plain error" under Rule 52 (Pet. 5–11) is, on the facts of this case, irrelevant because it is based on the erroneous premise that the judge did not charge on criminal intent. He did. The judge charged that "where one who knows that others are acting together to violate the law intentionally cooperates to further the object of the conspiracy, he becomes a party to it." This told the jury that to find petitioner guilty of conspiracy they had to find that he knew the object of the conspiracy, knew that the object was unlawful, and that he intended to further that unlawful object. That is unlawful intent. In absence of an objection or a request for a further charge, this was clearly sufficient and affords no basis for a claim of fundamental or plain error.[2]

It should be noted that the statement in the petition that the "essence of petitioner's defense was that he cooperated with [Whelan] in order to discover what he was up to" (Pet. 5), is not supported by the record as a whole. Petitioner did not admit his participation in the acts charged to him by the testimony of the government agents and try to explain his motive in thus acting. The essence of his testi-

[2] Thus, the case affords no occasion for resolution of the asserted conflicts (Pet. 10) among the circuits in application of Rule 52(b).

[1] The conspiracy count will itself support the sentence.

mony, as we read it, is the denial that he actively assisted the agent at all in dealing with narcotics. He explained his association with the agent (which was so corroborated that it could not be denied) by testimony that he thought the agent was a fence, and said that through that association he learned of the narcotics traffic. But he denied all the testimony as to active assistance. Thus, he denied that there was any discussion of narcotics at all when he first met the agent; denied any acquaintance with or knowledge of McMurray's narcotics activities; denied telling the agent that the agent could have dealt with Annette; and denied knowledge about the others except as told him by the agent.[5] The issue for the jury, therefore, was whether petitioner did actively promote the sale of narcotics, as the officers testified, or whether he did not do so, as petitioner claimed. That issue was directly submitted to the jury under the instructions quoted above and resolved against petitioner.

2. The fact that petitioner was found guilty of only one of the two counts of conspiracy, even though the judge charged that the two counts were aspects of one conspiracy, raises no question of general importance. The two counts were separated so that there could be no question which penalty applied, 5 to 20 years for sales without order form in violation of 26 U.S.C. 4705(a), or 2 to 10 years, the penalty for transactions not from the original stamped package in violation of 26 U.S.C. 4704(a). As the charges

[5] Petitioner never even requested an instruction embodying the "assistance" theory of defense on which the petition now claims he was placing his entire reliance. (Pet. App. 4a-5a).

were framed, however, count 1 dealing with the absence of an order form was couched (as it had to under the statute) in terms of sale, whereas the count dealing with the original package referred only to purchase (although sale and distribution are prohibited as well). The jury, obviously believing that petitioner and "Annette" were concerned only with the selling of narcotics, made a distinction between the two counts (see the Statement, *supra*, p. 8, as to the jury's question). Whether the separation of the purchase and sale aspects of the conspiracy was inadvertent or deliberate,* the acquittal of petitioner on the second count is clearly attributable to the special form in which the conspiracy was pleaded and raises no general question. And since petitioner did participate in conspiring to sell and selling without an order form, he can claim no prejudice from the manner in which the conspiracy was charged.

At most, petitioner's complaint is that under the instructions the verdicts were inconsistent: a single conspiracy was charged in two counts and he was acquitted by the jury on one of them. However, consistency in verdicts is not required. *Dunn* v. *United States*, 284 U.S. 390, 393.

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*Conceivably under some circumstances a conspiracy to purchase could be separate from a conspiracy to sell, but no such claim was made by the government when the judge charged that only one conspiracy was involved.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
Attorney.

APRIL 1962.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 787

DALE BRYSON, *Petitioner*,

v.

UNITED STATES OF AMERICA

PETITIONER'S REPLY TO BRIEF OF UNITED STATES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

EDWARD BENNETT WILLIAMS
HAROLD UNGAR
Counsel for Petitioner

April, 1962

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM 1961

No. 787

DALE BRYSON, *Petitioner*,

v.

UNITED STATES OF AMERICA

PETITIONER'S REPLY TO BRIEF OF UNITED STATES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The Solicitor General makes as little attempt to defend the Tenth Circuit's construction of Rule 52(b), F.R. Crim. P., as he did in *Ryles v. United States*, October Term 1948, No. 593 (see Petition herein, p. 12). Unlike his position in *Ryles*, however, he does not suggest in the instant case that the interests of justice would be served by permitting the case to be retried. We submit that his asserted justification for taking a different position in the instant case amounts to begging the question. Brief in Opposition, p. 9.

The basic question is whether, in a case where a defendant, for the purpose of detecting crime and reporting it to local law enforcement authorities, cooperates with an undercover federal narcotics agent,

whom he believes to be a criminal, and thereby facilitates narcotics transactions between the agent and others it is plain error affecting substantial rights for the trial court to fail to instruct the jury on the subject of *mens rea*. The Solicitor General makes no attempt to defend the total absence of any instruction on criminal intent in relation to the substantive counts of the indictment. He points only to the intent instruction on the conspiracy counts:

> "... . where one who knows that others are acting together to violate the law intentionally cooperates to further the object of the conspiracy, he becomes a party to it."

The Solicitor General says, as to this instruction:

> "In absence of an objection or a request for a further charge, this was clearly sufficient and affords no basis for a claim of fundamental or plain error."

Therein lies the begging of the question. Had there been an objection or a request for a further charge, there would be no occasion to invoke the plain error rule. And, since that rule permits a reversal even in the absence of an objection or a request for a further charge, the Solicitor General's statement would appear to be less than helpful.

The Solicitor General's statement can have meaning only if it is his position that petitioner would have had no right to a fuller intent instruction even had he requested it. That position would amount to saying that one who participates in a criminal transaction for the purpose of detecting and reporting it is guilty as a matter of law. If that is what the Solicitor General believes, logic would require him to say that the nar-

cotics agent himself, who made the purchases in the line of duty, was also guilty and could have been convicted had he been named a defendant instead of merely a co-conspirator. If it be said that the narcotics agent had no intent to further the object of the conspiracy, but rather to frustrate it, then the same must be said of the petitioner on this record.

The only argument that can be made to support a conviction of petitioner is that his defense was an unbelievable fabrication. Indeed, the Solicitor General makes that argument. Brief in Opposition, pp. 9-10. But that would be an issue for the jury. Certainly, the Solicitor General may not ask this Court to hold that petitioner was not entitled to a fuller instruction on criminal intent, when the Court below never reached that question. The holding of the court below was, in effect, that, whether or not petitioner would have been entitled to a fuller instruction, he lost his right by failing to ask for it. The essential point of the instant petition is that the failure of the trial court to submit that issue to the jury was plain error affecting substantial rights.

CONCLUSION

It is respectfully submitted that the reasons for granting the writ as set forth in the petition have in no way been obviated by the brief in opposition and that the petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

EDWARD BENNETT WILLIAMS
HAROLD UNGAR
Counsel for Petitioner

April, 1962